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In the Supreme Court U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 23

THE UNITED STATES OF AMERICA, as Guardian of the Indians of the Tribe of Hualpai in the State of Arizona,

Petitioner,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

Brief for the State of Arizona, County of Coconino, County of Mohave and County of Yavapai, Arizona, as Amici Curiae

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TABLE OF CONTENTS

I.

INTRODUCTORY STATEMENT 1

II.

ARGUMENT:

As to lands in the First Cause of Action and the Taylor Grazing Act 3

As to the Taxing Power of the State and its Counties 3

As to Certain Collateral Considerations which would Arise from a Decision that the Claimed Right of Occupancy was a Justiciable One 4

As to Patents under Homestead and Preemption Statutes 5

III.

COMMENT 5

IV.

CONCLUSION 8

CASES CITED

Kansas Indians, The, 5 Wall. 737 4

United States v. Northern Pacific Ry. Co. 311 U. S. 317 ..... 6, 7

United States v. Shoshone Tribe of Indians, 304 U. S. 111 4

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STATEMENT

The controversy in this case directly involves the respective rights of the Petitioner and Respondent in lands lying entirely within the boundaries of the State of Arizona, portions of which lie within the boundaries of the respective counties of Coconino, Mohave, and Yavapai. A decision by this Court that immemorial occupancy of lands by an

Indian tribe creates, without more, a right to maintain that possession, cognizable in the courts, would have a disruptive effect upon the entire economy of the State. It is a matter of common knowledge that a large percentage of the population of the State, other than Indian, is located within the confines of the Salt River Valley. Large portions of this area were until very recent times, and some portions now are, occupied by Indian tribes, and the character of such occupancy as respects permanence and exclusiveness is at least equal to any claimed for the Walapai in this case. See 2 Hodge, *Handbook of American Indians*, Smithsonian Institution, Bureau of American Ethnology, Bulletin 30, Page 251. Any suggestion by this Court that Indian tribes might have rights in property enforcible in a court of law by the mere fact of occupancy would at least cast a cloud upon the title to the major portion of Arizona. The State and its counties are directly concerned with the result of the action with respect to the power of taxation and the benefits which may be received under the Taylar Grazing Act (48 Stat. 1269). They must, of course, as friends of the Court, take the cause as they find it; but it is only proper that they should also call to the Court's attention collateral considerations which should, if there be doubt as to the proper determination of the issue, be given consideration in arriving at a final determination. The Attorney General having withdrawn from the case (R. 215), proper evaluation by counsel for the Petitioner of the respective interests of the States and the Indians in the further presentation of the case is no longer assured.

All of these considerations have dictated the fil-

ing of this brief *amici curiae* by this State and its three named counties.

ARGUMENT

First—As to Lands in the First Cause of Action and the Taylor Grazing Act. The odd-numbered sections within the bounds of the Walapai Reservation have been taxed by the State and these counties since 1924. These lands are in any event no longer subject to taxation by the State and these counties by virtue of the transfer of any interest therein by Respondent to the United States of America (Respondent's Appendix, 77-88). If these lands be determined to be not subject to the Indian right claimed by Petitioner, the provisions of the Act of May 25, 1918 (40 Stat. 561, at 570; Sec. 211, Title 25, U. S. C. A.), which prohibits the creation of new, or extension of any existing, Indian reservations, would probably prevent them from being a part of the Walapai Reservation. They would thus be subject to the provisions of the Taylor Grazing Act (48 Stat. 1269), as amended, and this State and its counties would be entitled to the benefits to be derived by virtue of Sections 10 and 11 [U. S. C. A., Title 43, Sections 315(i) and 315(j)]. On the other hand, if it be decreed that the lands were subject to the Indian right here claimed, the contrary result would probably ensue, the lands under that view being properly included in an Indian reservation at the time of its creation. It is respectfully submitted that Respondent's presentation on the merits of this cause of action in its brief is conclusive.

Second—As to the Taxing Power of the State and its Counties. Lands subject to an Indian right

of occupancy of the sort here claimed would have no value in the hands of the railroad or any one else other than the Indians having the right of occupancy, *United States* v. *Shoshone Tribe of Indians*, 304 U. S. 111, at 116, and having no value, no revenue could be derived therefrom by ad valorem taxation. The right of occupancy of the Indians would not be the subject of taxation, *The Kansas Indians*, 5 Wall. 737. As to this we respectfully urge the correctness of the views expressed in Respondent's brief as to the lands in the second cause of action.

Third—As to Certain Collateral Considerations Which Would Arise from a Decision That the Claimed Right of Occupancy was a Justiciable One.

(1) *As to State School Lands.* The Act of June 20, 1910 (36 Stat. 557), the enabling act for the admission of New Mexico and Arizona into the Union, granted to the State (Section 24) sections 2, 16, 32, and 36 in each township for support of the common schools. Much of this land has already been patented to the State.

If Petitioner's theory of a right of possession based solely upon factual occupancy be sustained by this Court, grave doubt will be cast upon the validity of the patents already issued to the State.

As to all lands to which the title has already vested in the State, examination will have to be made as to the facts which existed at the time of the vesting and from that time down to date. If the factual occupancy of an Indian tribe is not disclosed, such an examination would dispel the doubt.

If it were disclosed, the State could do nothing but wait until the tribe brought suit against the State or a method was provided for the State to sue the tribe. None now exists.

Fourth—As to Patents Under Homestead and Preemption Statutes. Rights under these statutes were initiated by settlement upon the land. The statutes offered to grant lands upon condition of settlement and cultivation. The settlers accepted the offer by settling and cultivating. After the prescribed period or the prescribed payment, patent issued. As to these patents, recognition of Petitioner's position would raise a more serious question. Settlement was essential. In the case of lands in the factual occupation of a tribe of Indians, if Petitioner's contention is correct, the settlement could only be by a wrongful invasion of the Indian right of possession. It would be a new concept of congressional morality to say that it consented to the initiation of a right to property by a wrongful act. Statutes of limitation furnish no analogy. The short answer is that these were not intended as statutes of limitation.

COMMENT

We should not pass without note that although the complaint was so drawn by Petitioner that it could rely on several alternative theories (R. 3-5, 7-10, 15-19), it abandoned all but two by the time of the hearing on the motion to dismiss and in the Circuit Court and here urges but one, i.e., that these Indians had factually occupied the lands in controversy and that factual occupancy of the character claimed for these Indians had always been recog-

nized by the United States as creating a justiciable[1] right of possession (Petitioner's Brief, 6). Recognition of the right based upon factual possession is claimed to be found in judicial decisions since the early days of the United States and in definition by legislation since 1783 (Petitioner's Brief, 16). If this claim of Petitioner is to be accepted, then we can only conclude that a factual occupancy by Indian tribes of the character claimed for the Walapai existed rather generally throughout the original United States and that it was encountered in the new territories acquired by the United States to the West. Unfortunately, Petitioner fails to give it any character, although there is a hint that it was exclusive (Petitioner's Brief, 102), and this is somewhat qualified by the suggestion that the usual nomadic tribal occupancy is sufficient (Petitioner's Brief, 97). In the complaint, in the paragraph evidently designed to take advantage of the limitation of actions theory (R. 9), the possession of the "United States and the Walapai Indians" is alleged to be exclusive; but the Petitioner has abandoned so much of the original complaint in the journey to this Court that it is difficult to say that Petitioner now claims the possession to be exclusive. The point is important. Carried to its logical conclusion it demonstrates how completely unsound is Petitioner's position. It is clear from a long line of cases dealing with similar railroad land grants, of which *United States* v. *Northern Pacific Ry. Co.*, 311 U. S. 317, is the latest, that if the occupancy is under a statute, treaty, or valid Executive order which reserved the

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[1]Petitioner carefully avoids characterizing the claimed right as justiciable, but, as it is seeking the intervention of a Court, it must be assumed that the claimed right is not solely a political right.

lands for the exclusive occupancy of an Indian tribe, then such lands are excepted from the grant (p. 352). If Petitioner is correct, and the factual Indian tribal occupancy of lands which it claims is recognized as giving the Indian tribe a right to possession which is exclusive, then logically such lands are as much reserved in the one case as in the other and would not be within the grant. We do not apprehend that Petitioner would attempt to make a distinction merely because in the one case a statute, treaty, or Executive order was involved, and in the other the claimed recognition of the sovereign, in some other manner still not clear. The *Northern Pacific* case, at page 348, holds that a treaty which recognizes only non-exclusive rights of occupancy in an Indian tribe does not operate to prevent the lands from passing under the grant.

If the right of occupancy based on continuous exclusive factual occupancy be recognized, it should follow that the right is coextensive with its basis and is a *right* to exclusive occupancy. Such a right should logically prevent the lands from passing under the grant at all. *United States* v. *Northern Pacific Ry. Co., supra.* But Petitioner has expressly conceded in the Circuit Court and here (Petitioner's Brief, 6) that the lands did pass. Apparently the Petitioner takes the position that exclusive factual occupancy without more gives rise only to a non-exclusive right. This refined reasoning would not be readily apparent to the mind of the ignorant savage who is to be the chief beneficiary of it.

If of two tribes each holding lands in exclusive occupancy, one with a treaty, the other without, the former can maintain its occupancy as against all

while the latter must allow invasion of its factual possession, the savage mind would consider that the existence of the treaty was the controlling element. We agree with the savage.

CONCLUSION

We have in a very brief way called to the Court's attention the considerations which are of vital interest to the State in connection with the result of this litigation. That sustaining the position of Petitioner would have far-reaching effects upon the State and its people needs no extended demonstration. The Respondent in its brief has fully and completely covered all phases of opposition to the position of Petitioner, and we submit that it completely demonstrates the unsoundness of that position. Therefore, on the merits, these *amici curiae* adopt Respondent's brief in full.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

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